

STATE OF MICHIGAN
COURT OF APPEALS

SABAH YALDO,

Plaintiff-Appellee,

V

TOYOTA MOTOR SALES USA, INC., MEADE
GROUP, INC., d/b/a MEADE LEXUS, and
TOYOTA MOTOR CREDIT CORPORATION,
d/b/a LEXUS FINANCIAL SERVICES,

Defendants-Appellants.

UNPUBLISHED

January 2, 2014

No. 308600

Oakland Circuit Court

LC No. 2009-105129-NZ

SABAH YALDO,

Plaintiff-Appellant,

V

TOYOTA MOTOR SALES USA, INC., MEADE
GROUP, INC., d/b/a MEADE LEXUS, and
TOYOTA MOTOR CREDIT CORPORATION,
d/b/a LEXUS FINANCIAL SERVICES,

Defendants-Appellees.

No. 310018

Oakland Circuit Court

LC No. 2009-108129-NZ

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 308600, defendants appeal by right the trial court's judgment in favor of plaintiff, following a bench trial. In Docket No. 310018, plaintiff appeals by right the trial court's order denying, without prejudice, plaintiff's request for costs and attorney fees. We affirm both appeals, but remand for amendment of the judgment in light of the parties' agreement that return of the vehicle is appropriate upon satisfaction of the judgment and for renewal of plaintiff's motions for case evaluation sanctions, costs, and attorney fees.

This litigation arises from the purchase of a vehicle. On December 1, 2006, plaintiff purchased a 2007 Lexus LS 460. Plaintiff and his son, Danny, were the principal drivers of the vehicle. In approximately the first two years of ownership, plaintiff had the vehicle in for service on over twenty occasions. However, these service visits were unrelated to the vehicle's operation, but involved the sound system, molding, and trim. Plaintiff retained an attorney who contacted defendant, Toyota Motor Sales USA, Inc., regarding state, MCL 257.1401 *et seq.*, and federal, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA), 15 US 2301 *et seq.*, breach of warranty claims. Defendant¹ began to negotiate for the repurchase of the vehicle in March 2009. This initial offer provided that the vehicle must be "free of any damages, beyond normal wear and tear." Plaintiff did not accept this offer.

The offer and acceptance at issue in this case surrounds the following letter of August 19, 2009, from defense counsel, Bruce Terlep, to plaintiff's counsel, Steven Stancroff:

I have been asked by my client, Toyota Motor Sales, U.S.A., Inc., to provide you with its final settlement offer in response to the demand made by your client, Mr. Yaldo, for the repurchase of his Lexus 2007 LS 460L. Below is Toyota's final offer in this matter. . . .

This offer fully comports with any obligation Toyota may have under applicable state and federal laws, including the Michigan Lemon Law and Magnuson-Moss Federal Warranty Act. The above offer, in fact, is limited in its mileage deduction to the last known odometer reading gleaned from May, 2009 service records. Therefore, although your client has amassed additional miles in the past few months, these are not included and, no additional deduction, is made in this offer.

It is Toyota's position that your client is not entitled to incidental or consequential damages under either Michigan Lemon Law or Magnuson-Moss Act. The Michigan Lemon Law does not include incidental or consequential damages as part of any statutory recovery. Moreover, it is Toyota's position that it effectively disclaimed all incidental and consequential damages in its limited written warranty.

This offer shall remain open to August 31, 2009. Please feel free to contact me in the event your client wishes to accept this offer or should you have any questions or concerns in this regard.

In response, plaintiff's counsel sent the following email correspondence dated August 19, 2009, to Terlep and his assistant Barb Corso:

Please let Mr. Terlep know that we couldn't agree less with his interpretation of Michigan law. However, our clients have directed us to accept the offer.

¹ Because the settlement agreement involved defendant Toyota Motor Sales USA, Inc., the singular term "defendant" refers to this party only.

Hence, we agree to resolve this matter upon receipt of payment to our client and the law firm of \$4171.81 and payment to the lienholder of approximately \$53,220. Client shall not be responsible for making any further payments and Lexus agrees to satisfy the loan balance in full.

Will you be providing a release?

It does not appear that Terlep sent any correspondence in return. Rather, defendant's representative, Ashley Horstman, sent an email to Stancroff, plaintiff's counsel on August 21, 2009, that stated:

Could you please forward a copy of Mr. Yaldo's current registration and a W-9 for your firm? I will get the check expedited as soon as these documents are received.

On August 27, 2009, a legal assistant at the law firm of plaintiff's counsel sent Horstman the following email:

Attached is the W-9 form for our firm and the current registration on the Yaldo matter. Please let me know if you need any additional information.

The next available correspondence is an email from the legal assistant to Horstman dated September 22, 2009, and provides:

I have spoken with Vince Imperial at ISG trying to schedule the surrender on the Yaldo matter. I did want to make you aware that the vehicle is currently at the body shop having some repair work done. According to our client, the vehicle was recently vandalized. So the surrender will be delayed. Please let me know if you have any questions.

On October 8, 2009, counsel for defendant, Terlep, sent the following letter via email to plaintiff's counsel Stancroff:

As you are aware, Toyota agreed to repurchase your client's vehicle. The terms of the agreement were set forth in my correspondence to you of August 19, 2009.

To date, your client has not made the vehicle available for repurchase. When we spoke a few weeks ago, you advised me that the vehicle was in for repair at a body shop and would be made available "in a few days" for the repurchase. Neither I nor my client have heard back from your office in this regard. Moreover, your client has continued to use the vehicle and has been given the benefit of the continued use without the commensurate deduction for mileage since May of this year.

In addition, it is my understanding that your client is now three payments past due, totaling \$4570.04. This amount is greater than the amount to be refunded to the customer under the terms of our settlement agreement. Therefore, the buy-back of the vehicle cannot take place until the account with the lien holder has

been brought current. Please be advised that your client is in material breach of the settlement agreement and if your client does not cure this breach by becoming current on his installment payments by October 16, 2009, Toyota will consider its obligations under the agreement to be waived by virtue of your client's breach.

Please provide proof no later than October 16, 2009 that your client has made payments and is current on the outstanding loan. Furthermore, please be advised that the subject vehicle must also be made available by the week of October 19, 2009 in order that the repurchase may be consummated.

On October 8, 2009, Stancroff sent an email response, stating that a review of the settlement letter of August 19, 2009, and correspondence indicated there was no basis to demand additional payments, and that if Toyota refused to proceed with the settlement agreement it would be in breach.

Ultimately, plaintiff filed this litigation alleging breach of the underlying settlement agreement as well as federal and state warranty claims. The parties agreed to try the breach of the settlement agreement before the bench, and the bench verdict would determine if the remaining claims were presented to a jury. At trial, the parties disputed the import of the correspondence and whether any agreement was reached. Plaintiff acknowledged that the vehicle was in for service on over twenty occasions and sustained body damage in excess of \$10,000. He testified that he did not personally submit documentation evidencing the body damage to defendant. However, he did notify his counsel of the repairs. Furthermore, the first two repairs to the body of the vehicle were performed by defendant's agent, Meade Lexus, and therefore, the information was accessible to defendant. He testified that the settlement agreement was not contingent on the degree of damage to the vehicle. On the contrary, defendant's agent, Horstman, testified that defendant never repurchased a vehicle with damage in excess of \$300. The agent further testified that the settlement agreement was contingent on the vehicle being free from damage, the submission of repair records, and plaintiff's continued payment of the loan if the deal was not completed by August 24, 2009. Because plaintiff did not submit records,² it was assumed that the vehicle was free from damage. The agent acknowledged that, following the acceptance receipt by plaintiff's counsel, she requested additional documents in order to expedite the check.

The trial court held that the parties had reached a valid and enforceable settlement, ruling as follows:

The Court finds that the parties formed a valid and enforceable agreement to resolve Plaintiff's claim pursuant to the August 19, 2009 offer and acceptance and Defendant's conduct after receiving the acceptance. Acceptance may be shown by any act or conduct clearly evincing an intention to accept the offer. *Ludowici-Celadon v McKinely*, 307 Mich 149 (1943). Defendant's request for documents and the issuing of the check clearly evince its intention to accept the

² The parties disputed whether plaintiff's counsel submitted over 100 pages of records.

additional statement made by Plaintiff as part of the settlement agreement. The settlement agreement did not require surrender of the subject vehicle by a certain date and the condition of the vehicle was not a term of the settlement agreement. Defendant failed to present evidence that there were defects in the subject vehicle caused by accident damage. There is no evidence that the offer was contingent on the subject vehicle never having been in an accident. Defendant failed to prove by a preponderance of evidence that Plaintiff fraudulently induced it to make its August 19, 2009 settlement offer. The Court finds that Defendant Toyota breached the settlement agreement by demanding that Plaintiff make additional payments and by failing to perform its obligations under the agreement.

After the trial court rendered its decision, plaintiff filed a motion for case evaluation sanctions and attorney fees and costs. The trial court, noting that an appeal was pending, denied the motion for attorney fees and costs “pending completion of the appeal.”

Following a bench trial, a trial court’s conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm’rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964).

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Indus, Inc v Hobbs Int’l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). “The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). “Before there can be a legally enforceable obligation there must be an offer and an acceptance.” *Mathieu v Wubbe*, 330 Mich 408, 412; 47 NW2d 670 (1951). A valid contract needs an offer, acceptance, and mutual agreement to be bound, also known as a meeting of the minds. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 149; 662 NW2d 758 (2003). “Where the subject-matter does not require the contract to be written, oral agreements are as effective as written ones.” *Strom-Johnson Constr Co v Riverview Furniture Store*, 227 Mich 55, 67; 198 NW 714 (1924).

“[A] mere inquiry as to the terms of the proposal, or a request to modify or change the offer does not have the effect of rejecting the offer, and, if the offer has not been revoked, a party may accept it, although he previously asked the proposer to modify it.” *Johnson v Federal Union Surety Co*, 187 Mich 454, 467; 153 NW 788 (1915) (further citation and quotation omitted). “It is elementary that in order to give rise to a valid contract the acceptance must in every respect correspond substantially with the identical offer made. The acceptance must be absolute and unconditional, and if conditions are attached or if it differs from the offer, the transaction amounts only to a proposal and a counter-proposal.” *Marshal Mfg Co v Berrien Co Package Co*, 269 Mich 337, 339; 257 NW 714 (1934).

Under the principles governing contracts, an acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose. [*Powell Prod, Inc v Jackhill Oil Co*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002) (further citation and quotation omitted).]

“Whether an offer has been accepted and a contract formed involves a factual determination.” *Id.* at 97. To form a contract, the acceptance must be unambiguous and in strict conformance with the offer. *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). “If an offer does not require a specific form of acceptance, acceptance may be implied by the offeree’s conduct.” *Id.* Generally, assent to an offer may be shown by acts as well as words. *Id.* at 641.

“[C]ontracting parties are at liberty to design their own guidelines for modification or waiver of the rights and duties established by the contract[.]” *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). That is, the parties to a contract may waive or modify the original terms of their contract. However, the modification or waiver must be established by clear and convincing evidence of mutual agreement. *Id.*

In Docket No. 308600, defendant first alleges that there was no valid and enforceable contract between the parties, and the parties did not agree to a material term. We disagree. As previously stated, whether an offer has been accepted and a contract formed presents a factual determination. *Powell Prod, Inc*, 250 Mich App at 97. In a bench trial, the court’s factual findings are reviewed for clear error and conclusions of law are reviewed de novo. *Mettler Walloon, LLC*, 281 Mich App at 195. We cannot conclude that the trial court’s factual findings were clearly erroneous in holding that a binding settlement was reached.

A review of the documentation reveals that on August 19, 2009, defense counsel sent a letter of final settlement with a settlement amount of \$54,893.68 less \$53,218.87 to the lienholder, \$1,674.81 to plaintiff, and \$2500 to plaintiff’s attorney for fees. The settlement amount acknowledged that the amount due the lienholder would increase after August 24, 2009. That is, the lien amount would increase after August 24, 2009, and plaintiff would be required to make additional payments to the lienholder if the deal was not completed by that date. Consequently, in response, plaintiff’s counsel sent a letter of acceptance, but noted that “Client shall not be responsible for making any further payments and Lexus agrees to satisfy the loan balance in full.” Defense counsel never sent any correspondence in return rejecting that phrase, irrespective of whether it is classified as an “additional” term or “counteroffer.” The next activity consisted of Horstman requesting a copy of the vehicle’s current registration and the W-9 form for the law firm. Thus, defense counsel forwarded the acceptance by plaintiff’s counsel to Horstman, and her actions indicated that the parties had reached a settlement because she took steps to obtain the documentation to order the check for plaintiff. She also must have notified ISG, the transfer agent of the resolution of the matter, and on or before September 22, 2009, ISG contacted plaintiff’s counsel to complete the transaction by surrender of the vehicle.

The trial court held that counsel’s statement that plaintiff would not be required to make any additional payments constituted an additional term and that defendant accepted this term by

its conduct. In light of the record evidence, we cannot conclude that the trial court clearly erred in this factual determination. *Mettler Walloon, Inc*, 281 Mich App at 195; *Powell Prod, Inc*, 250 Mich App at 97. In response to the statement that plaintiff would not make any additional payments, defendant never objected and its subsequent action indicated its acceptance. Moreover, Horstman acknowledged that there essentially was no change to the offer if the deal was completed by August 24, 2009. Specifically, she testified that a check could be “cut” within a day. It is unclear why defendant did not simply issue a check to the lienholder by that date to avoid this dispute. In light of the actions by defendant’s agent following receipt of plaintiff’s response to the offer, defendant’s contention that the trial court erred in holding that a valid and enforceable contract existed is without merit.

Additionally, defendant contends that the parties did not reach a meeting of the minds because the essential term of who was responsible for paying the lienholder if the deal was not completed by August 24, 2009, was not reached. However, the trial court held that defendant, through its actions, accepted the term that plaintiff would not be responsible for any more payments. Therefore, by implication, defendant, through its actions, accepted responsibility for either completing the transaction by August 24, 2009, or making arrangements with the lienholder. Curiously, there was no indication in the record that defendant needed to wait for documentation from plaintiff to pay off the lienholder. This claim of error is without merit and is counter to the trial court’s factual findings.

Next, defendant contends that the condition of the vehicle was a material term or condition of the settlement offer. We disagree. The trial court held that the condition of the vehicle was not a term of the settlement agreement. A review of the documentation revealed that in March 2009, Horstman extended a settlement offer to plaintiff. This settlement agreement contained the express provision that “The vehicle must be delivered with clear title . . . and free of any damages, beyond normal wear and tear.” However, the settlement offer extended by defense counsel on August 19, 2009, did not contain any statement regarding the condition of the vehicle. Moreover, it did not acknowledge or incorporate by reference any terms found in previous settlement offers. Defendant’s contention is not supported by the plain language of its settlement offer, plaintiff’s response, or defendant’s actions. The trial court did not err in this ruling. *Mettler Walloon, Inc*, 281 Mich App at 195; *Powell Prod, Inc*, 250 Mich App at 97.

Defendant further asserts that there was a condition precedent that the vehicle be free of any damages, and plaintiff failed to satisfy this condition, having had body work in excess of \$10,000 on the vehicle when defendant would only repurchase if \$300 or less occurred. Again, we disagree. The trial court held that there was no condition precedent in the settlement agreement. A review of the March 2009 settlement offer revealed that the vehicle had to be “free of any damages, beyond normal wear and tear.” The August 19, 2009, settlement offer did not contain any provision addressing the accident history of the vehicle. Horstman asserted that the extensive accident history on this vehicle would preclude a repurchase. However, that information was not conveyed in the August 19, 2009, settlement offer, and it is unclear why Horstman did not demand production of the vehicle for inspection prior to any request for documentation to execute the check. Accordingly, it cannot be concluded that the trial court erred on this record. *Mettler Walloon, Inc*, 281 Mich App at 195; *Powell Prod, Inc*, 250 Mich App at 97.

Next, defendant alleges that plaintiff committed fraud by omitting the material fact that the vehicle had been in multiple accidents and sustained in excess of \$10,000 in body work. The trial court held that disclosure of accidents was not contained in the settlement agreement. A review of the settlement offer reveals that there was no contingency that, prior to the repurchase, the documentation regarding accidents had to be submitted. Moreover, in her testimony, Horstman acknowledged that she had access to service records, and plaintiff testified that the first two accident repairs were performed at Meade Lexus. Therefore, irrespective of whether or not plaintiff had any obligation to disclose the vehicle's accident history, defendant should have been aware of the history at Lexus facilities and should not have merely assumed that the vehicle was accident free. There can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the party and the degree of their utilization has not been prohibited by the opposing party. See *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). In light of the fact that defendant had the means of discovering accident damage to the vehicle by examining Lexus records, the contention that plaintiff fraudulently induced defendant to enter into the transaction is without merit.

Finally, in this claim of appeal, defendant alleges that the judgment should be amended to require plaintiff to return the vehicle. In his brief on appeal, plaintiff agrees that return of the vehicle is appropriate upon payoff of the loan and payment of the refund. In light of the parties' acknowledgment that return of the vehicle is proper upon satisfaction of the judgment, we remand for amendment of the judgment in light of the parties' concession.

In Docket No. 310018, plaintiff argues that he is entitled to recovery of case evaluation sanctions as a matter of law and to attorney fees and costs. However, plaintiff's contention that the trial court "erred" in denying his motion for costs and attorney fees is not an accurate reflection of the lower court's ruling. The trial court did not deny the motion on the merits. That is, the trial court did not rule on the propriety of case evaluation sanctions or costs and attorney fees under the theories proffered by plaintiff. Rather, the trial court merely denied the motion because of the pending appeal, and denied the motion "without prejudice" pending the completion of this appeal.

The Court of Appeals is an error correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). When an appellant fails to challenge the basis of the ruling by the trial court, we need not even consider granting the party the relief requested. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Remand is warranted where the trial court's dispositional holding is insufficient for this Court to determine whether the trial court reached the proper result on the basis of its findings of fact. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000). This Court does not ordinarily render advisory opinions. *Rozankovich v Kalamazoo Spring Corp (On Rehearing)*, 44 Mich App 426, 428; 205 NW2d 311 (1973).

In the present case, plaintiff has not briefed and addressed the basis of the trial court's ruling: it denied the motion "without prejudice" until this appeal was complete. Rather, plaintiff argues the merits of an award of case evaluation sanctions pursuant to the court rule, and an award of attorney fees and costs contingent on underlying claims that were not technically tried by the court. Essentially, plaintiff requests that this Court render an advisory opinion regarding

the validity of his claims because the trial court has not ruled. We cannot conclude that the trial court erred, and plaintiff is free to renew his motion in the trial court.

Affirmed in both appeals, but remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs, neither party having prevailed in full.

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood